IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1147 of 2001

IN

SPECIAL CIVIL APPLICATIONNo 3183 of 1994

WITH

CIVIL APPLICATION NO 199 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHRIKRISHNA K. YADAV

Versus

STATE OF GUJARAT

Appearance:

1. LETTERS PATENT APPEAL No. 1147 of 2001

MRS KETTY A MEHTA for Appellant No.

MR LR PUJARI, AGP for Respondent No. 1-3

MR JAYANT P BHATT for Respondent No. 4-7

CORAM : MR.JUSTICE J.N.BHATT
and

MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 09/05/2002

CAV JUDGEMENT

(Per : MR.JUSTICE AKSHAY H.MEHTA)

Admit, service of which is waived by Mr. L.R. Pujari, Ld. AGP for respondents nos. 1 to 3 and Mr. Jayant P. Bhatt, learned advocate for respondents nos. 4 to 7.

2. The appellants who are the original petitioners have approached this Court under Clause 15 of the Letters Patent challenging the judgment of the learned Single Judge [Coram : P.B. Majmudar, J.] dated 3rd July, 2001 delivered in Special Civil Application No. 3183 of 1994. In the said petition the appellants had prayed for reliefs viz. to quash and set aside circular dated 15th May, 1993 by declaring it to be violative of constitutional provisions; to restrain the respondents from holding the qualifying examination till all the candidates named in the list at Annexure 'A' to the petition are given actual promotion to the post of Head Constable, Grade-II; to promote all the petitioners to the post of Head Constable, Grade-II with all consequential benefits; to issue direction to respondents not to appoint any candidate to the said post who would be clearing the qualifying examination subsequent to the petitioners. They also claimed certain incidental reliefs.

3. The facts and circumstances giving rise to the present proceedings in nutshell, can be stated as under:

3.1. The appellants joined the service of State Reserve Police Force, Gujarat State as direct recruit Constables. Their services are governed by the provisions of Bombay State Reserve Police Force Rules, 1959 (hereinafter referred to as 'the Rules'). Their say is that the provisions of rules 56, 57 and 59 of the Rules read together clearly lay down the eligibility criteria for promotion to the next higher post and according to these provisions promotion of Constables should be made from amongst those who are found fit and who have passed qualifying examination and they would get chance of promotion in accordance with date of passing the qualifying examination. Further, their say is that their seniority in the promotional cadre will also be determined on the basis of date of passing the examination. In other words, according to the

appellants, irrespective of the seniority amongst them in the cadre of Constables eligibility list should be prepared on the basis of date of passing the qualifying examination and they should be promoted in order of passing the qualifying examination. The appellants appeared and passed qualifying examination in the year 1992 and they became eligible for promotion to the post of Head Constables, Grade-II from the posts of Constables. It is their say that the department followed this practice for over 40 years which was in consonance with the rules stated above and promoted the persons who passed the qualifying examination and became eligible for being promoted as and when the promotion opened and the persons who were senior to them in the post of Constables, but who had not cleared the examination were not considered for promotion. They have further stated that though they were eligible for promotion and though there were vacancies in the promotional posts, they were not promoted even in the year 1994. In the meanwhile present respondents nos. 4 to 7 passed the qualifying examination in the year 1993-94.

3.2. Prior to that on 15th May, 1993 respondent no. 3 issued circular containing certain directions pertaining to qualifying examination and the promotion to the post of Head Constable, Grade-II, directing that the examination contemplated under rule 59 must be held every year and that no one should be left out on the ground that every year the examination is not held. It was also directed vide said circular that every year list of Constables should be prepared in accordance with their seniority and they should be allowed to appear in the examination keeping in view the number of vacancies available in the post of Head Constable, Grade-II. It also contained direction that a select list of the qualified candidates should be prepared and candidates should be promoted during that year from the said list and the list should continue for that whole year and if the list continued in the next year, all those who cleared the examination in the following year should also be included in the list of eligible candidates and that should be done in accordance with their seniority in the post of Constables. These directions were issued in view of the fact that in many parts of the State qualifying examination was not held for years together and those who were left out did not have any chance to appear in the examination.

3.3. The appellants, therefore, approached this Court by filing Special Civil Application No. 3183 of 1994 seeking reliefs already stated above. In nutshell their grievance was that despite they having become eligible,

they were then not being promoted. As stated above, this circular issued by respondent no. 3 also came to be challenged in this petition on the ground of it being violative of provisions of the rules as well as provisions of the Constitution of India.

4. The appellants came to be promoted on 11th December, 1998 to the post of Head Constable, Grade-II. According to the appellants, rule 56 envisaged that for promotion the criteria to be taken into consideration was fitness and eligibility of having passed the qualifying service. Since the appellants fitted in this criteria, they ought to have been promoted earlier in view of the fact that there were vacancies available in the cadre of Head Constable, Grade-II. Further their grievance is that those persons who passed the examination subsequently cannot be promoted ahead of them and treated as their seniors in promotional cadre by virtue of their seniority in the lower cadre. In the year 1999 the aforesaid rules came to be amended by notification issued by the Home Department, Government of Gujarat dated 3rd July, 1999. By virtue of that amendment in the matter of promotion to the post of Head Constable, Grade-II from the post of Constable two considerations, namely proved merit and efficiency; and seniority in the cadre of Constable are required to be kept in mind. It appears that Special Civil Application No.141 of 2000 came to be filed before this Court, which was disposed of on 25th February, 2000 wherein it was held that passing of qualifying examination will not be a rule of seniority. In light of this decision, respondent no. 3 on 19th July, 2000 issued clarification to the effect that the persons who were already promoted may not be disturbed, but as and when any person came to be promoted against any vacancy, his seniority to be adjusted in the promotional cadre if any junior was already promoted ahead of him. In this background, in Special Civil Application No. 3183 of 1994 respondents nos. 4 to 7 came to be joined by virtue of order passed in Civil Application No. 7975 of 2000 dated 6th December, 2000 as they appeared to be vitally concerned with this petition being senior to the appellants in the cadre of Police Constables and the appellants having been promoted ahead of them, despite the fact that respondents nos. 4 to 7 had cleared the qualifying examination by 1994. All these developments took place before the said petition, came to be decided and dismissed by the learned Single Judge vide judgment dated 3rd July, 2001. Having been aggrieved by the said judgment, the appellants have preferred this Letters Patent Appeal.

5. Mrs. K.A. Mehta, learned counsel for the appellants has contended that the appellants passed the qualifying examination in the year 1992 and as per the position of rules prevailing then and in particular rule 56 of the Rules, fitness and passing of qualifying examination were the only criteria for promotion of a candidate to the post of Head Constable, Grade-II from the cadre of Constable and in view thereof, the appellants who had become eligible for promotion in the year 1992 ought to have been promoted in that year considering the fact that as many as 11 vacancies were in existence then. She has further contended that the action of the respondents to place the candidates senior to the appellants in the cadre of Constables, but who had passed the examination at a later date than the appellants, above the appellants in the promotional post of Head Constable, Grade-II is violative of the Rules as seniority in promotional cadre is required to be determined in accordance with date of passing the qualifying examination. According to her, the amendment in the rules was brought about in the year 1999 and the said amended provisions cannot be applied in the case of the appellants since they had passed the examination in the year 1992. According to Mrs. Mehta, the amended Rules are prospective and their is nothing in these Rules which may indicate that they are to have retrospective effect. She has lastly submitted that the amendment in Rules was not brought to the notice of the learned Single Judge, otherwise the result would have been different, as that would have made two positions i.e. pre-amendment and post-amendment very clear and it would have shown that earlier seniority was never to be taken into consideration but it became criterian for promotion only after amendment in Rules in 1999 and prior to amendment only the date of passing the qualifying examination was the determining factor for promotion and adjusting the seniority in promotional cadre.

5.1. As against that, Mr. L.R. Pujari, Ld. AGP for the respondents nos. 1, 2 and 3 has submitted that there is no significant difference between the unamended rule 56 and the amended rule 56 of the Rules. According to him, even earlier the rule was that for considering a candidate eligible for promotion, his fitness was required to be kept in view and that fitness was required to be assessed on the basis of the service record of the concerned candidate. He has submitted that while assessing the fitness of the candidate, the Department was supposed to take into consideration all the factors relevant for promotion including the length of service put in by the concerned candidate in that cadre to judge

his fitness. He, therefore, submitted that by fitness it would not mean the physical fitness alone but overall fitness in the form of efficiency, seniority, etc., was required to be kept in mind. He, therefore, submitted that even by virtue of rule 56 as it existed in the year 1992 the Department was not supposed to ignore the seniority and seniority was very much a relevant factor in the matter of promotion to the post of Head Constable, Grade-II and also for governing the seniority in that post. He has submitted that in the year 1999 rule 56 came to be amended only with a view to make it more specific and clear and for that precise reason "seniority" came to be added in rule 56. According to Mr. Pujari, inclusion of word seniority in the amended rule would not mean that in the unamended rule 56 it was not one of the criteria to consider eligibility of the candidate for promotion. He has also submitted that in all other parts of the State this was the practice being followed, namely, that seniority based on the length of service put in by the candidates in the cadre of Constable was being taken into consideration and seniority based on the date of passing the examination was never a decisive factor.

5.2. Mr. Jayant P. Bhatt, learned counsel who appeared for the respondents nos. 4 to 7 submitted that the issue regarding seniority has already been concluded by the judgment of this Court rendered in Special Civil Application No. 141 of 2000 wherein it has been held that passing of qualifying examination would not be a rule of seniority. According to Mr. Bhatt, the promotion to the post of Head Constable, Grade-II is directly governed by the principles of seniority cum fitness and passing of the qualifying examination earlier alone will not give a candidate a right to prior promotion irrespective of his seniority. He also drew our attention to orders passed by the learned Single Judge of this Court in identical matters.

6. To appreciate the contentions advanced before us by the learned counsels, it would be necessary to reproduce the text of rules 56, 58 and 59 as they existed in the year 1992 :

"56. Promotion to the rank of Assistant Section Commanders (Naiks), Section Commanders (Havildars), Platoon Commanders (Jamadars) and Company Commanders (Sub-Inspectors) shall be made from amongst those who are fit and have passed the qualifying examinations. In judging the fitness for promotion the candidate's record of

service, character and ability to command the unit of which he is going to be in charge shall be taken into consideration.

57. The details regarding the rank of candidate who can appear for various qualifying examinations and the personnel of the Examination Board as given below :-

Sr. No.	Rank of the Examine	Examination for Promotion to the rank of	Personal of the Board of Examiners.
1	2	3	4
1.	Constables with the minimum service of 3 years. (Naiks).	Section Commanders	Assistant Commandant assisted by two officers not below rank of Police Inspectors.
2.	Assistant section Commanders(Naiks) and Constables (Havildars) with a minimum of 7 years' service.	Section Commanders	Commandant assisted by an Assistant commandant and an officer not below the rank of Police Inspector.
3.	Section Commanders with a minimum of two years' service and Havildar Majors	Platoon Commanders	
4.	Platoon Commanders (Jamadars) and Havildars Majors with a minimum of 2 years' service.	Company Commanders	Deputy Inspector General of Police in charge the Force assisted by two Commandants to be nominated by the Inspector General of Police.

58. Promotion to the rank of Havildar Majors shall be made from amongst Havildars according to

the seniority, provided they are fit.

59. The qualifying examinations mentioned in rule 57 shall be held once a year at the places and on the dates fixed by the Commandants concerned in the case of examinations referred to in serial Nos. 1 to 3 and by the Deputy Inspector-General of Police in charge of the Force in the case of examination referred to in serial No.4, in the statement given in the said rule."

Posts referred to in Rule 56 are redesignated as Head Constables Grade-II and Head Constables Grade-I.

6.1. The aforesaid rules provide a complete machinery for promotion of Constables to the post of Head Constable, Grade-II and Head Constables, Grade-II to Head Constable, Grade-I in the State Reserve Police Force. Rule 56 of the Rules (unamended) envisages promotions to be given from amongst those who are fit and have passed the qualifying examinations; and in judging the fitness for promotion, candidate's record of service, character and ability to command the unit of which he is going to be incharge, are required to be taken into consideration. Rule 57 prescribes details regarding rank of candidates who can appear in qualifying examination and constitution of examiners Board. Rule 59 envisages holding of qualifying examination referred to in Rule 57 once a year at the places and on the dates fixed by the concerned commandants.

6.2. The Home Department of the Government of Gujarat vide notification dated 3rd July, 1999 brought about amendment in the rules and the said rules came to be known as Bombay State Reserve Police Force (Amendment) Rules, 1999. By virtue of the amending rules, rules 56 and 57 of the Rules came to be substituted. Rules 56 and 57 came to be amended as under :-

"56. (1) Appointment to the post of Head Constable, Grade-II, Head Constable Grade-I, Platoon Commander or Armed Police Sub Inspector shall be made

(a) In case of Head Constable Grade II, by promotion of a person or proved merit and efficiency from amongst the persons working in the cadre, of the constable on the basis of seniority;

(b) In case of Head Constable Grade I, by promotion of a person of proved merit and efficiency from amongst the persons working in the cadre of the Head Constable Grade-II on the basis of seniority, and

(c) in case of Platoon Commander or Armed Police Sub Inspector, by promotion of a person of proved merit and efficiency from amongst the person working in the cadre of Head Constable Grade-I on the basis of seniority.

(2) To be eligible for appointment by promotion to posts mentioned in sub-rule (1), a candidate shall have passed the prescribed qualifying examination referred to in rule 60."

57. The persons specified in column (2) shall be eligible to appear in the examination for the posts specified in column (3) to be conducted by the members of the Board specified in column (4) of the table below :

xxx xxx xxx xxx xxx

The details of table are reproduced in Annexure - A to the memo of appeal and hence the same is not reproduced here.

Amended Rule 59 reads as under :-

"59. The qualifying examination referred to in rule 57 may be held once in a year at such place and on such date as may be fixed by the members of the respective Board."

After amendment Rule 56 came to be split up in sub-rules (1) and (2) and further sub-rule (1) came to be followed by clauses (a), (b) and (c). According to sub-rule (1) clause (a) appointment to post of Head Constable Grade-II can be made by promotion from the persons working in the cadre of the Constables on the basis of proved merit, efficiency and seniority. Sub-rule (2) prescribed that for becoming eligible to have promotions mentioned in sub-rule (1) a candidate shall have to pass qualifying examination. Thus for the

first time word "seniority" came to be inserted on 3rd July, 1999. Other things more or less remained the same. Rule 59 also came to be amended but even as per the amended provision qualifying examination referred to in rule 57 was directed to be held once in a year at such place and on such date that may be fixed by the members of the respective Boards.

7. It may be noted here that though clearing of the qualifying examination was one of the main criteria for making a candidate eligible for the promotion to the post of Head Constable, Grade-II and it was required to be held once a year, between the year 1994 and 1998, it was not held. In the year 1994 the examination was held but thereafter for three consecutive years the same could not be held in view of the stay order against holding of the examination granted by this Court in Special Civil Application No. 3183 of 1994. A chart giving details regarding years in which such examination was held and number of successful candidates each year has been submitted by the Ld. A.G.P., which is as follows :-

Year	Number of persons passing the examination	No. of persons promoted
1992	67	23
1993		05
1994	146	because of the stay in S.C.A. 3183/94 no promotion is granted upto December 1998
1998	406	61
1999	52	15
2000	-	03
2001	137	-

Thus, after 1994 it was only in the year 1998 the examination could be held and the appellants came to be promoted in that year. Moreover, it appears from the record that the qualifying examination was not being regularly held once in a year in some of the groups of the State Reserve Police Force and it was not at all held for several years. As a result thereof, many constables

who could have appeared in the examination had that been held every year, could not appear since no such examination was held in those years. It is, therefore, very clear that if the date of passing of the examination is required to be kept as the basis of seniority in the promotional post, grave injustice would be caused to the candidates who could not clear the examination by virtue of the simple fact that no examinations were held. This appears to be precise reason for which the circular dated 15th May, 1993 came to be issued which became the subject matter of challenge in these proceedings. For the same reason the learned Single Judge of this Court also issued directions to hold examination every year regularly in order dated 6th October, 1996 in Special Civil Application No. 6534 of 1996. Considering the issue from this angle, if the seniority in the promotional post is to be based according to the date of passing of the examination, it is bound to affect adversely to the persons who could not appear in the examination for the aforesaid reason and despite the fact that they had put in substantially longer service than their juniors, they would lose their seniority only because of the fact that the juniors had cleared the examination earlier in point of time. Apart from this, even if the issue is viewed from slightly different angle, it would show that date of passing examination can never be the only criterian for determining the seniority for promotional post. In a given case a senior most person in the cadre of Police Constables is unable to appear in qualifying examination held in a particular year due to compelling reason and cause beyond his control and many of his juniors clear the examination in that year. He is able to clear it only in the following year. Would this mean that all those juniors who cleared the qualifying examination in the previous year would steel march over him and his continuous officiation for years together would be wiped of for the purpose of fixing seniority in promotional cadre ? The answer can only be in negative as such proposition is not acceptable to service jurisprudence. The Hon'ble Apex Court in decision rendered in the case of State of Maharashtra v/s. J.A. Karandikar in Civil Appeal No. 3037 and 3038 of 1984 decided on 8th March, 1989, while discussing construction of rules for promotion in the background of irregularity in holding qualifying examination every year by the Government has observed as under :-

"10. This is a question of construction of the rules which form part of the scheme prescribing a condition for promotion. We do not have to

> reflect upon the rules of interpretation since they are well settled. They are not like the habits of driving which have become ingrained. They come to our assistance by instinct. We are to use the different rules meticulously to give effect to the scheme as we use the clutch, brake and accelerator for smooth driving. These rules are to be harmoniously construed. We should not concentrate too much on one rule and pay too little attention on the other. That would lead us astray and result in hardship. We must avoid such construction. Rule 2 of the 1962 Rules no doubt states that a candidate who does not pass the examination at the end of nine years' service will lose his seniority. But this rule cannot be read in isolation as the High Court did. It has to be read along with the other rules since it is a part of the scheme provided for promotion. Rule 5 requires the Government to hold the examination every year. This rule is the basis of the entire scheme and the effect of other rules depends upon holding the examination. If examination is not held in any year, the rule 2 cannot operate to the prejudice of a person who has not exhausted all his chances. The person who has not exhausted the available chances to appear in the examination cannot be denied of his seniority. It would be unjust, unreasonable and arbitrary to penalise a person for the default of the Government to hold the examination every year. That does not also appear to be the intent or purpose of the 1962 Rules."

One more aspect of considerable importance of issue regarding seniority in granting promotion is that though rules 56 and 59 of the Rules provide criteria for promotion and holding of qualifying examination every year, no provision with regard to seniority has been made with regard to Police Constables who passed the qualifying examination. No specific rule prescribing date of passing the qualifying examination as governing factor in determining the seniority in the matter of promotion from the post of Police Constable to the post of Head Constable, Grade-II and continuation of that seniority in promotional cadre has been brought to our notice. In absence of any such specific provision, it will be very difficult to conclude from unamended rule 56 of the Rules that date of passing the qualifying examination is the only factor to be considered in fixing the seniority and principle of continuous officiation

should not be taken into consideration at all. Sum and substance of the aforesaid discussion is that passing of qualifying examination will not confer any right of seniority to such qualified Constables and promotion to the post of Head Constable, Grade-II has to be granted from amongst the qualified Constables in accordance with their seniority. Certainly rule 56 as it stood then did not envisage any injustice to be caused to any person. It may be stated at this stage that passing of the qualifying examination merely brought the candidate into zone of consideration and the same did not confer any right on him to be promoted to the post of Head Constable, Grade-II. It is a well settled principle of law that nobody can claim a right to promotion despite the fact that the person claiming such right is fit and qualified for promotion and that there is vacancy in the promotional post. Thus, merely because the appellants had cleared the examination in the year 1992 and that there were vacancies available in the promotional post, it did not confer any right on them to be promoted to that post. It is the sole discretion of the Department to be exercised in accordance with the exigency prevailing then. The appellants, therefore, cannot make any grievance that they ought to have been promoted earlier than the year 1998 and they should be given seniority in cadre of Head Constable, Grade-II on the basis of their passing examination in 1992.

8. Even a perusal of rule 56 as it existed then clearly shows that for being considered for promotion to the post of Head Constable, Grade-II, the candidate was required to be fit and he should have passed the qualifying examination. It further required that for judging the fitness for promotion, candidate's record of service, character and ability to command the unit for which he was going to be in charge should be taken into consideration. The fitness stated in the rule did not mean only the physical fitness, but it also meant several aspects relating to his efficiency, seniority in the terms of length of service, etc. In rule 56 word 'seniority' was not specifically included then. The requirement regarding judging the fitness for promotion on the basis of candidate's record of service, clearly shows that aspect of seniority was very much to be kept in mind and there was no need to ignore it on the ground that seniority was not specifically mentioned and, therefore, it was not to be taken into consideration. Plain meaning of service record as given in Pretu's Judicial Dictionary Vol.II is :

"It means the record of service which the officer has rendered from the time of his entry into the

service until his discharge."

This will certainly include person's continuous officiation in particular cadre and the same cannot be overlooked while judging his fitness on the basis of his service record. If the 'fitness' referred to in rule 56 of the Rules was to be considered in respect of state of health alone of the proposed candidate, it would have been specifically mentioned as 'physical fitness' and not only 'fitness'. Moreover, words "In judging the fitness for promotion, candidate's record of service .... to be taken into consideration" appearing in rule 56 of the Rules indicate that all common aspects which are normally kept in view in the matter of granting promotion are required to be taken into consideration while deciding the eligibility of a candidate under rule 56. The unamended rule 56 cannot be pressed into service to say that it contemplated conferment of seniority on candidate by virtue of his passing the qualifying examination. Rule 56 of the Rules came to be substituted with amended rule 56 in the year 1999 wherein seniority was specifically included as one of the criteria for promotion to the higher post of Head Constable, Grade-II only with a view to clear the confusion which prevailed then. Hence by no stretch of imagination it can be said that criteria of seniority for the promotion came to be prescribed only for the first time with the introduction of amended rules in the year 1999. If that interpretation is to be made, it will result into chaotic condition and countless confusions. The contention of Mrs. Mehta, therefore, cannot be accepted.

8.1. Considering the foregoing discussion, it can well be said that the position prevailing prior to amendment in the matter of promotion and which came to be introduced after the amendment, was more or less the same except for the fact that later word "seniority" came to be inserted with a view to clarify the position existing earlier. We are, therefore, of the opinion that even if the amendment was brought to the notice of the learned Single Judge, it would not have made any difference.

9. It is time and again said by the Apex Court that one basic principle which must guide the Court that there is always a presumption that Government action is reasonable and in public interest and also in consonance with legal provisions. Party challenging validity of such action must show lack of reasonableness or public interest or the same being violative of statutory provisions. The burden is heavy one and the Court cannot lightly assume unreasonableness and strike down the Government action. In this case the appellants have

failed to discharge this burden.

10. In our opinion, if in the cadre of Head Constable, Grade-II the seniority is adjusted in accordance with the seniority in the cadre of Constable, there is nothing wrong in it and the Department is well within its rights to do so to avoid injustice being caused to any one.

11. In view of the aforesaid discussion, we find no merit in this appeal and hence it is required to be dismissed. The appeal is, therefore, dismissed with no orders as to costs.

In view of the dismissal of the appeal, Civil Application also stands disposed of accordingly. Interim relief is vacated. Notice is discharged.

* * *

At this stage learned counsel Mrs. Mehta submitted for extension of interim relief enjoyed so far during the course of the Letters Patent Appeal for a span of six weeks. Learned counsel Mr. Pujari, Ld. AGP for respondents nos. 1 to 3 and Mr. J.P. Bhatt for respondents nos. 4 to 7 strongly objected for extension of interim relief.

In the light of the facts of the case and considering the submission that the appellants intend to pursue further remedy before the Hon'ble Supreme Court, in the larger interest of justice the order of status-quo during the pendency of the Letters Patent Appeal shall stand extended for a further period of six weeks. Direct service is permitted for respondents nos. 1 to 3.

[J.N. BHATT, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.